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In The
Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, et al.,

Petitioners,

vs.

ARLENE FREEMAN AND JAMES ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF DAVID J. TEECE AND THOMAS M. JORDE IN SUPPORT OF PETITIONERS

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MOTION OF DAVID J. TEECE AND THOMAS M. JORDE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

David J. Teece and Thomas M. Jorde respectfully move this Court for leave to file a brief as *amici curiae* in support of the Petition in this case.

Pursuant to Rule 37.2 of the Rules of this Court, Professors Teece and Jorde sought written permission of all parties to the filing of a brief as *amici curiae*. The consent of the attorney for petitioners has been obtained. The letter of consent has been filed with the clerk of this Court. The consent of the attorney for respondents has been sought but has not been provided.

There is good cause for this Court to grant this motion. As described in the statement of identity and interest in the attached proposed *amicus curiae* brief, Professor Teece is an authority on matters of economic organization and business conduct, particularly as it relates to competition policy and intellectual property. Professor Teece is the Mitsubishi Bank Professor at the Haas School of Business at the University of California, Berkeley, where he also directs the Institute of Management, Innovation and Organization. Professor Teece has a Ph.D. in Economics from the University of Pennsylvania and has held teaching and research positions at Stanford University and Oxford University. He has testified before Congress on regulatory and competition policy. He is author of over 150 books and articles, and is the editor of "Industrial & Corporate Change" (Oxford University Press).

Professor Jorde received his J.D. from Yale Law School. He is Professor Emeritus of Law at Boalt Hall

School of Law, University of California, Berkeley, specializing in antitrust law. Professor Jorde is a founder of Boalt Hall's Law and Technology/Intellectual Property Program. Professor Jorde is the author of over 25 books, monographs, and articles, and is co-author of "Antitrust, Innovation and Competitiveness" (with David Teece, Oxford University Press, 1992) and "Intellectual Property in the New Technological Age" (with Mark Lemley, Peter Menell, and Robert Merges, Aspen Law and Business Press, 1997). Professor Jorde has testified in hearings before the Federal Trade Commission on competition issues, particularly as they relate to issues in interfirm cooperation.

Professors Teece's and Jorde's concern for this case arises out of their two decades of combined work on, and study of, inter-firm cooperation and contractual relations in the context of antitrust policy. Professors Teece and Jorde have a keen interest in seeing good public policy sustained in this area. They have worked hard to try and help both the judicial and legislative branches of government understand how to distinguish beneficial cooperation from collusion and cartelization.

Professors Teece's and Jorde's proposed *amici curiae* brief does not replicate the legal arguments persuasively advanced in the Petition, nor the arguments set forth in the *amicus curiae* brief of the National Association of REALTORS®, which focuses on the unique importance of this case to the real estate industry. Rather, Professors Teece's and Jorde's brief explains, from the perspectives of a nationally-recognized economist and a professor of antitrust law, the broad deleterious ramifications of the Ninth Circuit's opinion on the economy as a whole, and the need

for clarification from this Court in the area of competitor collaboration for a healthy economy.

Respectfully submitted,

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BRIEF OF DAVID J. TEECE AND THOMAS M. JORDE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, David J. Teece and Thomas M. Jorde submit this brief in support of the Petitioners.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Professor David J. Teece is an authority on matters of technological change and organizational structure, particularly as it relates to competition policy and intellectual property. Professor Teece is the Mitsubishi Bank Professor at the Haas School of Business at the University of California, Berkeley, where he also directs the Institute of Management, Innovation and Organization. Professor Teece has a Ph.D. in Economics from the University of Pennsylvania and has held teaching and research positions at Stanford University and Oxford University. He has testified before Congress on regulatory policy and competition policy, is author of over 150 books and articles, and is the editor of "Industrial & Corporate Change" (Oxford University Press).

Professor Thomas M. Jorde received his J.D. degree from Yale Law School. He is Professor Emeritus of Law at Boalt Hall School of Law, University of California, Berkeley, specializing in antitrust law. Professor Jorde is a founder of Boalt Hall's Law and Technology/Intellectual Property Program. Professor Jorde is the author of over 25 books, monographs, and articles, and is co-author of "Antitrust, Innovation and Competitiveness" (with David

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

Teece, Oxford University Press, 1992) and "Intellectual Property in the New Technological Age" (with Mark Lemley, Peter Menell, and Robert Merges, Aspen Law and Business Press, 1997). Professor Jorde has testified in hearings before the Federal Trade Commission on competition issues, particularly as they relate to issues in inter-firm cooperation.

Professors Teece's and Jorde's concern for this case arises out of their two decades of combined work on, and study of, inter-firm cooperation and contractual relations in the context of antitrust policy. Professors Teece and Jorde have a keen interest in seeing good public policy sustained in this area. They have worked hard to try and help both the judicial and legislative branches of government understand how to distinguish beneficial cooperation from collusion and cartelization.

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INTRODUCTION

The Federal Trade Commission and the Antitrust Division of the Justice Department frequently point out that in the last twenty-plus years, they have brought relatively few civil cases against competitor collaborations. This notwithstanding, these agencies allow that there is "a

perception that antitrust laws are skeptical about agreements among actual or potential competitors" that "may deter the development of procompetitive collaborations."[2]

To understand why such a notion might persist, one need look no further than the opinion of the Ninth Circuit Court of Appeals in *Arleen Freeman, et al. v. San Diego Association of Realtors, et al.* The Court of Appeals has managed to make out a naked price fix, one worthy of immediate and unflinching per se condemnation, in the ancillary arrangements of a joint venture. Seemingly, these arrangements would not have been subjected even to a rule of reason analysis by the antitrust agencies, but instead would have been allowed without challenge. It is little wonder that there persists the perception that the antitrust laws and the courts remain suspicious, and even hostile, toward competitor collaborations, even when they are procompetitive.

The opinion and judgment of the Court of Appeals in the present case troubles us on a number of grounds, not the least of which is its facile application of per se analysis to the necessary, but entirely ancillary, arrangements of a genuinely procompetitive joint venture.[3] This is because, in today's economy, cooperative arrangements among firms have emerged as a leading source of new products and increases in consumer welfare that could not otherwise be

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[2] Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (the "*Competitor Collaboration Guidelines*"), April 2000, at p. 1.

[3] The rationales by which various courts have chosen between per se and rule of reason treatment of challenged restraints has long troubled economists. For a useful summary of the economic perspective on this issue, see Richard Schmalensee, "Agreements Between Competitors" in Thomas M. Jorde and David J. Teece, eds., ANTITRUST, INNOVATION, AND COMPETITIVENESS (New York: Oxford University Press, 1992).

achieved. But if the judgment below were to stand, the threat of per se condemnation would loom large in the calculus of would-be joint venturers, making them unwilling to risk many collaborations from which consumers and society would benefit. In those instances, our economy would have to make do with the second-best choice of, on the one hand, requiring the would-be collaborators to cease their existence as independent competitors, and instead to merge into single entities beyond the reach of Section 1, or on the other, of foregoing entirely the procompetitive benefits that their collaborations could produce. This seems to us to be an unacceptably high price to pay for the courts' unwillingness, at a minimum, to analyze the ancillary arrangements of an otherwise procompetitive joint venture under the rule of reason. It also is our view that the internal arrangements of a procompetitive joint venture producing a product that would not otherwise exist (and that are reasonably necessary for that product to be produced) should be given the same deference that would be given by the courts and antitrust agencies if the collaborators had merged instead.

THE INCREASING IMPORTANCE OF JOINT VENTURES AS A SOURCE OF INNOVATION AND COMPETITION

The development, commercialization, and diffusion of new products and processes have long been the most fundamental competitive force in advanced industrial economies, generating economic growth, enhancing consumer welfare, and in the process, constantly challenging and frequently overturning the established order within and among markets and industries. Such innovation is unquestionably a major force, if not the major force, driving competition. But increasingly, such innovation has required the cooperative contributions of otherwise independent economic entities.

In the context of studying the international competitiveness of U.S. firms, Nobel Laureate Robert Solow and his colleagues noted nearly 15 years ago:

> Undeveloped cooperative relationships between individuals and between organizations stand out in our industry studies as obstacles to technological innovation and the improvement of industrial performance. . . .
>
> Interfirm cooperation in the U.S. has often, though not always, been inhibited by government antitrust regulation.[4]

Yet despite the interjection of economic thinking into antitrust analysis in earlier decades, it took some time before the courts, the antitrust agencies and the Congress recognized the central importance of cooperative arrangements among independent economic entities to our economic well being. There have been some important developments, including the passage in 1993 of the National Cooperative Research and Production Act (which extended to production joint ventures protections from full antitrust liability that earlier had been accorded to research and development collaborations among firms) and the promulgation in 2000 by the Federal Trade Commission and the Department of Justice of the *Antitrust Guidelines for Collaborations Among Competitors.*

It is now widely recognized by Congress and antitrust agencies that the public interest is served by many forms of cooperative activity among competitors. But potential procompetitive joint ventures and similar cooperative arrangements among competitors remain haunted by the specter of judicial antitrust condemnation.

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[4] MADE IN AMERICA: REGAINING THE PRODUCTIVE EDGE by Michael Dertouzos, Richard Lester & Robert M. Solow (Cambridge, MA: The MIT Press, 1990) at 7, 105.

We have devoted a significant part of our academic and professional careers to the subject of innovative, procompetitive joint ventures and other forms of collaborations among cooperating firms, and to the importance of getting such collaborations analyzed appropriately by the courts and the antitrust agencies.[5] It remains our core belief that procompetitive collaborations among competitors are a powerful engine for the development and introduction of new products and services, for the expansion of economic output, and for increases in total consumer satisfaction. As such, these collaborations ought to be seen as being benign from an antitrust perspective and as efficiency-enhancing from an overall public policy perspective. Accordingly, they ought to be encouraged by the courts.

THE SANDICOR JOINT VENTURE AT ISSUE IN THIS CASE

Before the formation of Sandicor in 1992, San Diego County was served by twelve multiple listing services, each maintained and supported by a different real estate association, with each association operating in its own local part of the county. Some of these associations had earlier taken the decision to share their listings, so that just prior to the creation of Sandicor, there were four different MLS databases covering parts of San Diego County. The costs of maintaining each database were apportioned among the associations using it, and each association provided its own support services, whose scale and scope differed from one association to the next.

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[5] See, for example, Thomas M. Jorde and David J. Teece, "Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology," 61 ANTITRUST L.J. 579 (1993).

Because the county was covered by four different, disjoint MLS databases, a real estate agent who sought access to all listed properties in San Diego County was required to subscribe to four separate MLS products.

During the 1990-1991 period, eleven of these associations decided to enter into a new joint venture, Sandicor, in order to combine their separate databases into a unified MLS product. In return for the payment of a single subscription fee, this integrated Sandicor MLS database would allow an agent anywhere in San Diego County to access all listed properties located throughout the county. Operating costs would be reduced because there would be just one database to maintain.

The members of the Sandicor joint venture standardized the support services that enabled individual agents to utilize the integrated Sandicor MLS database. But they also determined that these support services should be provided locally by Sandicor's individual parent real estate associations, and not by Sandicor itself on a centralized basis.

The joint venturers comprising Sandicor then decided on the terms under which Sandicor would purchase the specified local support services from the individual associations. In order to induce all eleven associations to enter into the joint venture, Sandicor elected to pay the same monthly amount per subscribing agent to each association in return for the local associations' provision of the needed services. The decision to pay the same amount per agent, combined with the facts that these associations historically had widely differing per-agent accounting costs to provide support services and that the agreed-upon rate of reimbursement was higher than the lowest of these historical accounting costs, appears to have exercised the Court of Appeals.

THE RELEVANT ECONOMIC FEATURES OF THE SANDICOR AGREEMENT

The primary purpose of Sandicor was to produce a single, integrated, countywide MLS database providing listings for all of San Diego County that real estate agents could access in return for the payment of a single subscription. Prior to Sandicor, no such product existed, and an agent was required to purchase individual subscriptions to at least four separate MLS database products in order to achieve countywide coverage.

All parties to this litigation, and the Court of Appeals itself, have acknowledged that the creation of this new product of Sandicor was, and remains, unambiguously procompetitive because it increased competition and reduced costs in connection with San Diego County real estate transactions. In particular, it:

- Increased the number of potential buyers for particular listings anywhere in San Diego County.
- Increased the number of competing properties for sale that a prospective buyer could consider.
- Reduced the total cost in subscriptions that an agent needed to pay in order to obtain access to all listings in San Diego County.

Such a countywide MLS database product did not exist prior to the formation of Sandicor by its eleven member associations. *A fortiori*, none of these individual associations actually competed, either alone or in conjunction with other associations, in the production and sale of such a countywide MLS database prior to the decision to form Sandicor.

No single association on its own, or a small group of associations working together, could have produced the countywide MLS database product, because that countywide product required the integration of a least four separately-owned and -maintained MLS database products. Each of these eleven associations had an ownership

interest in one or the other of these four legacy databases. This meant that their integration into a single, countywide product required the voluntary consent and cooperation of each of the eleven associations.

The "support services" at issue in these proceedings were never the principal product of, or reason for, the Sandicor collaboration. While they are necessary in order for the primary product of Sandicor to exist at all, these services were and are merely ancillary to the countywide MLS database itself. They were not the purpose of Sandicor.

Prior to the formation of Sandicor, the term "support services" had as many different meanings and content as there were individual associations. Only with the Sandicor joint venture did "support services" become a well-defined term, with the same menu and scope of "support services" standardized across the member associations.

The "prices" or "costs" associated with the differing pre-Sandicor "support services" of the several associations are not strictly comparable. There are several reasons for this:

- The support services themselves differed from one association to the next.
- Even if otherwise reliable, these "prices" or "costs" are a measure of the *historical* expense to provide "support" to agents in the particular locality served by each association.
- The supposed "costs" of each of these associations to provide "support services" upon which the Court of Appeals has focused must be taken with some skepticism. This is because "support services" is only one of the functions performed by local real estate associations. Because all of these functions (whether expense- or revenue-generating) typically share the same staff, building, furnishings and equipment, the apparent "cost" of support services depends to a considerable degree on the scale and scope of the other

functions performed by the association, as well as on the accounting methods used to "allocate" the total costs of shared staff, building space, furnishings and equipment to particular association functions, including "support services". In other words, two separate associations could expend precisely the same effort and resources per member, and be equally efficient in some absolute economic sense, in providing a specified schedule of support services, but nevertheless show widely differing per-agent accounting costs for these support services because of the economic extent of their other functions, and their potentially different accounting methods for allocating joint revenue and expenses.

Sandicor was formed in 1992, and its San Diego countywide MLS database product has been in existence for about a decade. Sandicor's system of compensating the several associations for delivering the mandated support services has been in operation for the same period. Consequently, there is no need to speculate about possible prospective benefits and costs of the Sandicor collaboration; instead, there is an ample historical record upon which to base any necessary conclusions.

Finally, it is important to remember that Sandicor was formed as the result of the voluntary, unanimous decisions of eleven separate, independent associations, and its continued existence has required ongoing unanimity on their part. Each of these eleven associations, in turn, is governed by its member agents, who have always retained the power to reverse their own association's decision to participate in the Sandicor collaboration.

ANALYSIS OF SANDICOR UNDER THE 2000 *COMPETITOR COLLABORATION GUIDELINES*

In April 2000, the Federal Trade Commission and U.S. Department of Justice issued the aforementioned *Competitor Collaboration Guidelines* in order "to assist businesses

in assessing whether the Agencies will challenge a competitor collaboration or any of the agreements of which it is comprised." *Guidelines* at 2. However, in fashioning these *Guidelines*, the antitrust agencies have for the most part kept their cards close to their vests, reserving the right to exercise judgment and discretion in light of the facts specific to each case, and offering little in the way of general assurances of "per se legality" or safe harbors. Nevertheless, these *Guidelines* support the conclusion that the agencies would not have challenged the Sandicor joint venture or its agreement in respect of payments for "support services", and they state that this agreement would, at worst, be analyzed under the rule of reason. This is a far cry from the treatment the Sandicor agreements got from the Court of Appeals.

In its per se condemnation of Sandicor, the Court of Appeals fixated on the joint venture's establishment of a single price at which it purchased the specified support services from each of its parent associations. If, instead, the eleven associations simply had merged into a single countywide association, that resulting association unquestionably would have been free to establish a single price at which it purchased support services on the open market, or to establish uniform compensation for its employees who provided support services to members. This is because, to our knowledge, no proposed merger involving local real estate associations has been challenged by the agencies in recent memory.

Given the above, it follows, under the terms of the *Guidelines*, that the agencies would not have challenged the arrangements for support services adopted by the Sandicor joint venture. This is because these arrangements are identical to what the associations would have been free to adopt if they instead had merged completely

into a single San Diego County association, a combination that would not have been challenged by the antitrust agencies.[6,7]

Importantly, it is the view of these agencies that it is not required that an agreement be *essential* in order for it to be deemed "reasonably necessary". Rather, under the *Guidelines*, the antitrust agencies "consider whether *practical, significantly less restrictive* means were reasonably available *when the agreement was entered into*, but do not search for a theoretically less restrictive alternative that *was not practical given the business realities* (emphases added)." *Guidelines* at 9. This point is taken up below.

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[6] The *Guidelines* state in relevant part:

> [I]n some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate with a sufficiently limited period. . . . In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger.

Guidelines at 5.

[7] Even assuming, for the sake of argument, that the Sandicor agreement in respect of support services was deserving of per se treatment, by the terms of the *Guidelines* the agencies likely still would have analyzed that agreement under the rule of reason. See, *Guidelines* at 4.

SOME POSSIBLE ELEMENTS OF A RULE-OF-REASON ANALYSIS OF THE SANDICOR AGREEMENT CONCERNING SUPPORT SERVICES

It is not our intention here to offer a full rule of reason analysis or defense of the ancillary Sandicor agreement regarding payment to the individual associations for providing support services. Instead, we simply sketch the considerations and questions that would need to be addressed in the course of a rule of reason balancing of the procompetitive and possibly anticompetitive elements of the Sandicor agreements. We also note that, for the most part, none of these considerations and questions were even recognized, much less dealt with adequately, by the Court of Appeals.

Even accepting, *arguendo*, that the price established by Sandicor for support services was "supracompetitive", a rule of reason analysis should ask, at a minimum, whether the *total* cost of subscribing to all MLS listings in San Diego County had increased or decreased as the result of the Sandicor agreements. It is important, in other words, to recognize that agents' total subscription fees may have fallen substantially, because now agents needed but one subscription to a single MLS database product, rather than the four subscriptions that were necessary pre-Sandicor. A rule of reason analysis would need to determine whether the allegedly "supracompetitive" price for support services was more than offset by savings on the subscriptions themselves. In our view, it was a mistake for the Court of Appeals to focus on the "price" of just support services in isolation.

In any case, it is not obvious, as a matter of economics, that charging a supposedly supracompetitive total cost for MLS subscriptions and support services would have had any impact on consumers by leading to higher real estate prices. It is our understanding that real estate

agents typically charge commissions that are set at a *percentage* of the eventual selling prices of properties. But it is hard to credit, as a matter of economics, that the *selling prices* for San Diego County real estate properties would have been sensitive to (or in any way a function of) the prices paid by agents for MLS subscriptions and support services.

Without much more economic analysis than is apparent in the decision of the Court of Appeals, it simply is not possible to conclude anything about the "prices" or "costs" of support services produced by the individual associations, either before or after the formation of Sandicor. It was uncontroverted that, before Sandicor, the support services offered by each of the individual associations were not the same. It also was not disputed that the scale and scope of the standardized support services mandated by Sandicor were potentially different from those that the individual associations had produced previously. The historical accounting costs of the individual associations to provide pre-Sandicor support services were intended, at best, only to measure the associations' costs to render such support in their respective local areas. Even apart from the conceptual difficulties that potentially bedevil the figures relied upon by the Court of Appeals (see the discussion above), there can be no assurance, without a much more extensive record, that the supposed per-agent costs of the San Diego Association of Realtors (SDAR) would be unchanged if, for example, the SDAR attempted also to provide support services to agents in Valley Center, Fallbrook or other outlying parts of San Diego County.

It may have been the considered business judgment of Sandicor and the individual associations that "support services" are best rendered locally, in close proximity to the agents being supported, and that it would be infeasible for SDAR to provide support services to agents in Oceanside, Escondido, Julian or El Cajon. A court should be

reluctant to gainsay such a judgment without a much more extensive inquiry than that available to or undertaken by the Court of Appeals.

In its attempt to sketch a supposedly less anticompetitive alternative to the Sandicor agreement concerning support services, the Court of Appeals offered that it would have offended the antitrust laws less for the "efficient" associations to have proceeded to a Sandicor-like collaboration that excluded the MLS databases of the "inefficient weaklings" (such as Valley Center and Fallbrook), and for this combination of the "efficient" then to have driven the "weaklings" out of business over time.

Economically-plausible arguments can be offered in support of the conclusion that this course of action would not have made business or economic sense, and would not have been in the best interests of consumers. The associations forming Sandicor may have decided that it was necessary to limit competition among themselves in the production of the ancillary support services, in order to insure the quality and consistency of both those services and of the integrated MLS database itself. For example, these associations may have recognized that it would not be feasible for Sandicor to monitor the support services being produced by each of the parent associations, even though the procompetitive benefits of Sandicor's primary product, the countywide MLS database itself, depended critically on the quality, quantity and consistency of these locally-produced support services.

Obviously, the rationale for the Court of Appeals' supposedly "less anticompetitive" alternative depends on the accuracy, reliability and comparability of the "cost" figures relied upon by that Court. In addition, the Court's preferred alternative proves too much. By its logic, SDAR alone should have been the single provider of all support services anywhere in San Diego County. Anything short of a monopoly on the provision of support services by SDAR would have meant that Sandicor still had agreed to

purchase *some* support services at "supracompetitive" prices (which the Court of Appeals has judged a per se violation) or that these other associations were selling such services at a loss. In any event, it is hard for us to understand why the other ten associations should have willingly subscribed to a Sandicor agreement that might well also have meant their demise.

We note finally that, by the time of the decision at the Court of Appeals, there had been roughly ten years of actual experience under the Sandicor agreements, yet certain events appear *not* to have occurred. For example, it is our understanding that none of the memberships of the eleven parent associations ever elected to secede from the Sandicor collaboration. We take this as evidence strongly suggesting that the agent members of the local associations have concluded, on balance, that the increased benefits of the Sandicor collaboration outweigh their increased costs (if, indeed, there are any). Also, we notice that no single association or small group of associations have decided to produce their own partial-county MLS database product and to compete for the listings and subscriptions of their "inefficient" brethren. We view this as possible support for the conclusion that there really was no "efficient" subset of the eleven associations that was being "overcharged" for support services in order to sustain other, "uncompetitive" associations.

THIS AND OTHER COURTS' SUSPICION OF JOINT VENTURES WILL HAVE ADVERSE ECONOMIC CONSEQUENCES

The Court of Appeals based much of its analysis of the Sandicor joint venture on its finding that the several associations remained independent competitors, and that they had not proceeded to any significant economic integration. As a consequence, concluded that Court, the Sandicor

agreement in respect of support services amounted to naked price fixing among horizontal competitors.

This view of the Court of Appeals is echoed in many of the reported cases involving joint ventures and similar competitor collaborations. In these cases, the courts have focused on whether or not the joint venturers or collaborators have achieved the requisite degree of financial and economic integration to be deemed a single entity for Section 1 purposes. In many of these cases, the courts do an inadequate job of delineating the particular spheres in which the collaborators remain competitors, failing to distinguish competition in other arenas from competition in the novel product of the joint venture itself. We view these tendencies as wrongheaded and unhelpful to the goal of maximizing society's potential benefit from such collaborations.

The potential economic benefit of joint ventures such as Sandicor is that society is able to enjoy a new, procompetitive product or service that could not otherwise exist, *while continuing to enjoy the benefits of competition among the joint venturers in other areas.* In other words, the maximization of this potential social gain depends, in significant part, on the extent to which the collaborators do *not* achieve the financial or economic integration seemingly required by some courts.

Because these same courts then treat these unintegrated competitors as undeserving of the deference the courts routinely give to the decisions of monolithic firms, society loses still further. This is due to the fact that the joint venturers must forego the arrangements that would be both natural and optimal for a single entity, and instead to adopt second-best arrangements that may prevent society from realizing the maximum potential benefit from their collaboration. For example, a single entity may routinely and freely decline to use market mechanisms and price competition to allocate its internal resources and

employees, and to rely instead on hierarchical decision making, and no court would object.

The antitrust laws do not require firms that allow individual employees to "compete" with each other on the basis of price to determine which employee will be assigned to a particular task.[8] It is now recognized in economics that only some allocative decisions are best left to price competition in arms-length markets, and that a significant share of all allocative decisions are made *within* firms using nonprice mechanisms. Indeed, it is understood that the boundary between allocative decisions that are left to price competition in markets and those decisions that are made by internal hierarchies is itself a function of economic forces.[9] Similarly, it now seems well-established in the case law that limitations on, or avoidance of, intrabrand competition (for example, among sellers of a particular branded product) can lead to sharpened interbrand competition that maximizes society's overall economic well being.

The courts should draw a lesson from the fact that firms routinely and legitimately find it optimal to eschew price competition when making some internal decisions, while at the same time using markets for others, and that this choice is governed by economic considerations. The decisions by firms to "outsource" some functions that historically had been carried out internally are a leading example. At the same time, it might be perfectly rational and acceptable for the members of a joint venture (for

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[8] Presumably, appellate judges, when deciding how to assign legal research or drafting tasks, do not always insist on holding auctions among their clerks and assigning the duties to the low-price bidder.

[9] See, as the seminal work, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS by Oliver E. Williamson (New York: The Free Press, 1975) and THE ECONOMIC JUSTIFICATIONS OF CAPITALISM by Oliver E. Williamson (New York: The Free Press, 1985).

example, a collaboration to design, produce and market a new kind of automobile employing fuel cell technology) to allocate certain phases or components of the total productive effort to individual members who were not the "low cost" producer of that phase or component. For example, such a joint venture might agree to purchase the vehicle drive trains from its member enterprises at a cost that was above the price of the most efficient producer. Would the Court of Appeals similarly condemn this joint venture for fixing the price at which it acquired drive trains from its members, without any consideration given to the likelihood that, as a result, the collaboration itself might never be achieved, depriving consumers and society of clearly beneficial technologies and products?

It is our view of the current legal landscape that the court decisions dealing with joint ventures, competitor collaborations and the choice between per se and rule of reason treatment are fraught with inexplicable and inconsistent holdings. We defer to counsel for Appellants to survey the relevant and problematic cases, though above, we have noted the conflict between the Court of Appeals' decision and the likely treatment of the Sandicor agreements by the antitrust agencies.

The ambiguities and inconsistencies we have identified are not merely the stuff of law review articles; they can have significant effects on the real economy. Ambiguities and uncertainities in the law can create a real danger that innovation will be stymied, and that procompetitive collaborations will not be consummated. When the parties to a proposed collaboration have taken pains carefully to consult with antitrust counsel, yet nevertheless find themselves condemned as little more than a cabal of price-fixers, the message to all would-be collaborators is thunderous. Business people dislike uncertainty and risk, and to avoid it, they frequently will take decisions that designed to reduce their legal exposure. In doing so, they may eschew arrangements that would have increased

economic well being. We and society may never know with certainty what "could have been", but we are certain that the cost to our society's economic well being will be significant unless this Court provides clear and reliable guidance to would-be joint venturers. Were the decision at the Court of Appeals to stand, it likely would result in the loss by the U.S. economy and its consumers of the procompetitive benefits that are unattainable only through the collaboration of independent competitors, and instead, make outright mergers the only way to achieve such benefits confidently.

CONCLUSION

For the foregoing reasons, David J. Teece and Thomas M. Jorde respectfully urge this Court to grant the Petition for certiorari.

Respectfully submitted,

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